

Remedial alternative to 1978 Constitution

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Features

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Sri Lanka has had three constitutions to experiment with since Independence. The debate over a constitution that addresses the wishes of the people has long been a contentious one. Ever since 1978 constitution was adopted, the debate kept resurfacing each time a dictatorial conduct is displayed by the government of the day and then after a while the debate tends to diminish owing to lack of enthusiasm.

The 1978 constitution was a masterpiece engineered by late President J R Jayewardene purely to consolidate power which centred on the executive presidency. The absolute majority in the Parliament also provided a free reign to Jayewardene to manipulate the constitution to his own advantage and undermine the democratic rights of citizens.

The underlying rationale for having an executive president was to push through economic reforms that were demanded after a period of extreme difficulties confronted by people over scarcity of food, resources, long queues and unemployment during the United Front government. The open economic policies of Jayewardene brought about a massive development to the country through free trade zones, development projects such as Mahaweli and the construction of high rise buildings in Colombo.

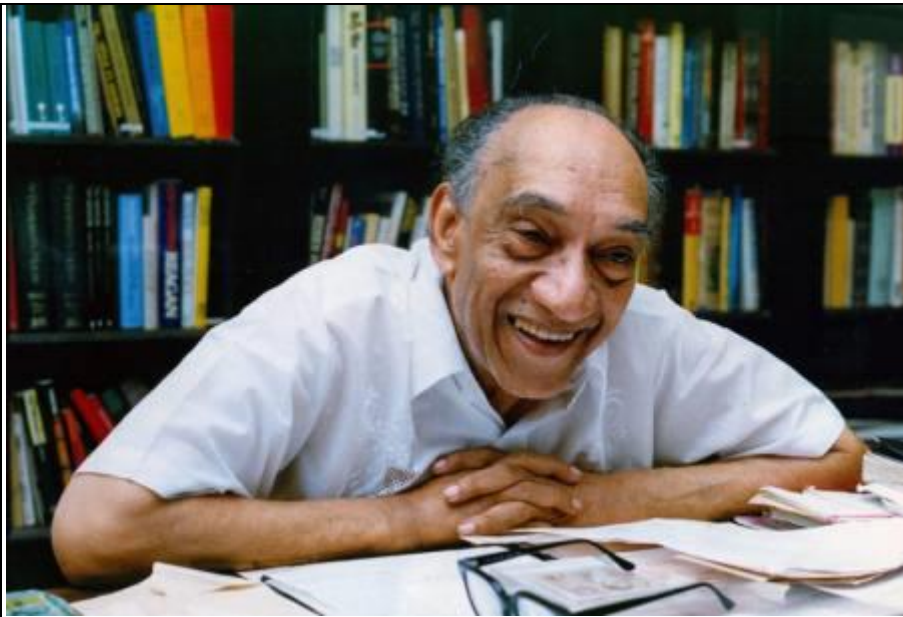
It would be pertinent to look into the constitutional manipulations that were considered wholly repugnant to the public morality and spirit of good governance and democratic practices.

1972 Constituent Assembly and the first Republican Constitution

Though Sri Lanka (Ceylon) gained Independence in 1948, the country was under the British dominion. The notable feature under the 1948 Soulbury constitution was that there was a judicial remedy to approach the Privy Council in UK, being the final court of appeal. There was yet another feature that protected the rights of minorities under section 29(2) which states that no law passed by Parliament “shall (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions or (d) alter the constitution of any religious body. The Section 29(3) provided that any law made in breach of section 29(2) would be rendered void to the extent of its breach.”

This position was affirmed by the UK Privy Council in an appeal from Sri Lanka namely The Bribery Commissioner v Ranasinghe in 1964. The Privy Council further stated that Soulbury constitution was accepted on these conditions hence these provisions are entrenched in the constitution and cannot therefore be altered. This was the legal order that continued from the colonial past. This was considered a fetter on the legislative power of Parliament as such Parliament of Ceylon could not be considered sovereign then. Some argue that British Parliament wanted to ensure that the new constitutional dispensation in 1948 would ensure the equality of all citizens irrespective of their ethnic background.

The greatest assault on the Section 29(2) was when the Official Languages Act (Sinhala Only Act) was passed in the Parliament in gross defiance of the sentiments of the minorities. Hence there was an imperative need to have a break in that colonial legal order and this could be achieved through an autochthonous constitution through a constituent assembly.



J R Jayewardene

Long before the general election of 1970 there were intense discussions over a new constitution and this culminated in the incorporation of a passage in the joint manifesto presented to people by the SLFP, LSSP and CP which states: "We seek your mandate to permit the MPs you elect to function simultaneously as a Constituent

Assembly to draft, adopt and operate a new Constitution. This constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy."

These sentiments were echoed in the Resolution introduced by the late Prime Minister Sirimavo R D Bandaranaike which states that the "authority (derived) from the people of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and the Parliament of the UK." In Kelsenian parlance, this was the 'grundnorm' or the fundamental postulate that derives power from people.

A historical move by President Maithripala Sirisena

Some critics have questioned as to the timing of the Constitutional Assembly proposed by the government to draft and adopt a new Constitution. This is an opportunity people must seize as it would be highly unlikely that yet another President would undertake this noble mission of giving up power. President Sirisena has even defied the oft-quoted statement by Lord Acton that "power tends to corrupt and absolute power corrupts absolutely". It is laudable that President Sirisena has extended his hand for the welfare of the country which must be heralded and applauded.

Successive governments experimented with consolidating power by rushing through constitutional amendment in the guise of urgent legislation, not really for the welfare of the people but for their own survival. Some even engaged in gross display of political vulgarism and machinations surpassing the dictum given by Machiavelli.

The kangaroo courts were created overnight to take revenge from Field Marshall Sarath Fonseka and deprived him of pension. An extraordinary measure was taken to impeach the Chief Justice solely because the judicial reasoning was unpalatable and warranted a mighty urgency to remove the former Chief Justice Dr Shirani Bandaranayake. She was left with no judicial remedy and natural justice for was an anathema. The events that preceded the presidential election in 2015, such as dishing out free meals under the

guise of seminars/conferences also highlighted the need to trim the excessive powers concentrated on the Executive President.

The feeling of being an 'Emperor' had to be rooted out. Are we therefore prepared to see yet such an episode in an unknown future or take immediate steps to eliminate the phenomenon using this opportunity?

It would be a great folly if this opportunity of adopting a new constitution is diluted through politically chicanery. No room must therefore be left to acrimony. What is important is to have a wider public participation in the consultative deliberations.

We have ample precedents to follow. The Constitution of India was adopted after two years, 11 months and 18 days of deliberations. South African constitution was adopted after a prolong deliberations by all the stakeholders. The preamble to the South African constitution provides an interesting description.

It states:

"We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country;

And believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;

And Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people".

A leaf out of the South African experience would be ideal for Sri Lanka.

Fourth Amendment to the Constitution (1982 referendum)

The UNP government presented the fourth Amendment to the Constitution, which proposed to extend the life of the parliament by six years. The bill was challenged before the Supreme Court and was found to be consistent with the provisions of the Constitution by the Supreme Court, in a 4-3 majority ruling. The Supreme Court of Sri Lanka said that "the majority of this court is of the view that the period of the first Parliament may be extended as proposed (if) passed with the special majority (in parliament) required by Article 83 and submitted to the people at a referendum."

The fourth amendment was then presented to the parliament. The government followed the Supreme Court opinion and sought the 'special majority'. It had the full support from the parliament which was well above the two thirds majority.

The 1982 Referendum to extend the life of parliament was considered an utterly obnoxious exercise to extend the UNP rule by another six years without holding a general election to test the electorate. The underlying rationale was to maintain the supermajority enjoyed by the J R Jayewardene government and also to carry on unimpeded, the development initiatives he had begun.

According to many political observers this Referendum was a dictatorial move by President Jayewardene and strongly opposed the referendum and campaigned vigorously to defeat the whole UNP campaign. This undemocratic move also provided breathing space for deflated SLFPers and Marxists who had been routed at the 1977 election and had been thrown into oblivion by the masses.

Vasudeva Nanayakkara was a vociferous critic of the UNP policies and the constitution, though he had made remarkable U turns in the recent past holding ministerial positions under a government which was pursuing neo-capitalist and elitist policies. Still the worst is that he had left his admirers aghast over the path he has taken to defend a corrupt regime and his choice of words in the Parliament lately.

Instrumental use of the 1978 constitution

The 1978 constitution drew sharp criticism from the senior parliamentarians of the calibre of Dr Colvin R de Silva and Dr N M Perera. Dr N M Perera published a book titled 'A Critical Analysis of the 1978 Constitution of Sri Lanka' in which he had stated that the constitutional presidential dictatorship is dressed in the raiment of a parliamentary democracy. There is an ample academic literature on the subject of constitutional dictatorship. The Constitution empowers the President to seek an opinion from Supreme Court but the recent past proved that the opinion could be withheld from the public and the public will have no knowledge of the legal basis on which the determination was arrived at. This is a ludicrous exercise in the 21st century information age.

Even counsels are not provided with a copy of such a determination. This type of undemocratic features must be removed from the new Constitution. Successive governments often resorted to constitutional measures to insulate itself from the dangers of being defeated at the hustings. Forcible defection of MPs to the government, side under the garb of strengthening the hand of the Executive President and to ensure the stability of the government in the face of an adversary must now be dispensed with.

Let's put an end to this type of convoluted logic.

Dr N M Perera, in his concluding paragraphs, notes: "1978 constitution carries the notoriety of what a constitution should never be."

Faulty reasoning

Some experts with ultra-nationalistic fervour have pointed out that by weakening the central government, the proposed constitution might provide room for controversies to erupt in the periphery thus driving the country towards anarchy which will ultimately end

up in the breakup of the country. The critics have simply jumped the gun as none of us has even seen the draft constitution.

Some argue that national security must be given paramount importance in giving concessions to north and east. President Sirisena recently alluded that a war had to be waged because the successive governments miserably failed look into the grievances of the minorities and it ended up in a brutal war which threatened the national security from all directions. According to President Sirisena, it is the absence of a solution to the ethnic issue that will threaten the national security.

Prime Minister Ranil Wickremesinghe has spelt out the procedure through the resolution, that it is the Constitutional Assembly that would draft the constitution. The words of wisdom from Dr Nihal Jayawickrema befit the current debate on constitution making.

“Constitution making becomes a meaningless exercise if it does not respond to the evolving aspirations of the people of this country. The voice of the minority communities in the north and east has been loud and clear in its support for genuine autonomy.

They ask for space; space which they are entitled to as of right in this multicultural state of which they are an integral part; space in which to preserve their unique identities because identity is the central issue of being; space in which to keep alive their languages and their history, their legends and their stories. The identity of a community is inviolable. It is not enough to be who we are; we must also be seen and heard and respected for who we are.”

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